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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/511,124	05/03/2005	Marion Detert	104035.283799	2259

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EXAMINER	
YU, GINA C	

ART UNIT	PAPER NUMBER
1617	

NOTIFICATION DATE	DELIVERY MODE
09/24/2007	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No.	Applicant(s)	
	10/511,124	DETERT ET AL.	
	Examiner	Art Unit	
	Gina C. Yu	1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1 and 3-16* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1, 3-16* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☒ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *10/12/04, 01/10/05*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1, 3-11 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 defines the claimed preparation as "a gel-type". This phrase renders the claim vague and indefinite since it is not clear whether the composition is a gel or encompasses some other form of a composition.

Claim 5 recites a list of polymers that further define "one or more anionic polymers" of claim 1, but not all of the recited polymers are known as anionic polymers. For example, polyquaterniums are well known cationic polymers. See Cosmetic Additives, p. 505. Thus, the metes and bounds of the scope of the term "anionic polymers" are not clear.

The remaining claims are rejected as these claims depend on claim 1, which is indefinite as explained above.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1, 3-6, and 10-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Muller (US 6221347 B1) in view of Poucher's Perfumes, Cosmetics and Soaps (10th ed., 2000) ("Poucher") and Flick (Cosmetics Additives, 1991).

Muller teaches a method of making compositions for cleaning or caring for the skin or hair which has an aqueous phase containing a pregelatinized, crosslinked starch, particularly hydroxypropyl di-starch phosphate. See Abstract. The starch acts as a stability improver, a viscosity regulator, a (co) emulsifier, a skin feel improving agent, and an agent for improving hairdressing characteristics. See col. 5, lines 23 - 65. Thus the use of the Muller starch derivative in hair styling agent is an obvious use of the prior art. See instant claim 15. Since the reference teaches that the starch derivatives "prevent the deposition of solid constituent", the skilled artisan would have found it also obvious that the prior art, when used as a hair care agent, will aid in removing deposits from the composition. The reference also teaches in col. 5, lines 43 –46, "cosmetics

containing a starch derivatives to be used according to the invention can be spread very well onto the skin and do not leave behind a sticky feeling", which would have been obvious to the skilled artisan that the spreadability of a hair care composition comprising the same starch derivatives would be also improved. The reference teaches the amount of the starch derivatives to be used in the aqueous phase in col. 5, lines 12 – 23. See instant claims 6, 15, 16.

Muller teaches to formulate the composition in the form of a high viscosity alcoholic gel, and optionally to add additional thickening agents. See col. 7, line 66 – col. 8, line 44. The reference also suggests an application of the starch derivative in hair conditioning compositions. See col. 7, lines 19 – 26.

While Muller does not specifically teach using anionic polymers with the pregelatinized polymer, the combination is viewed obvious further in view of Poucher and Flick.

Poucher teaches a styling hydroalcoholic gel composition comprising Carbomer 940 (anionic polymer) and polyvinyl pyrrolidone (nonionic polymer). See p. 249. The reference teaches that styling gel formulations are derived from setting lotions by adding structure and formulated in a variety of strengths as well as other attributes such as 'wet look', conditioning/moisturizing or 'shine'.

According to Flick, Carbopol 940 (carbomer) is polyacrylic polymer having molecular weight of 4,000,000, which meets instant claim 5. See p. 335-6.

It would have been obvious to one of ordinary skill in the art at the time of the present invention to modify the teachings of Muller by formulating a hair styling gel, as motivated by Poucher, because both 1) prior arts are directed to making hair care

products and gel formulations, and 2) Poucher teaches a specific gel formulation which provides styling, conditioning/moisturizing and shining properties to the hair. The skilled artisan would have had a reasonable expectation of successfully producing a stable gel styling composition since Muller teaches that the pregelatinized starch datives is used in a high viscosity gel formulation.

Claims 1, 3-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Muller (US 6221347 B1) in view of Keil et al. (US 5833869).

Muller is relied upon as discussed above.

Keil teaches aqueous hair fixing compositions in the form of a highly viscous sprayable gel. See abstract. The gel preferably has a viscosity of 0.2-10 Pa.s. See col. 1, lines 62 – 67; instant claims 7-9. The reference teaches adding thickeners, preferably anionic polymers (acrylic acid homopolymers with a mw of 2,000,000 to 6,000,000), and polyvinylpyrrolidone polymer. See col. 3, lines 6 – 53. The sprayable gel is said to provide good hair fixing properties and proportioning and distributing properties. See col. 1, lines 30 – 37.

It would have been obvious to one of ordinary skill in the art at the time of the present invention to modify the teachings of Muller by formulating highly viscous sprayable gel, as motivated by Keil, because both 1) prior arts are directed to making hair care products and gel formulations, and 2) Keil teaches a specific gel formulation which provides good hair styling properties and proportioning and distributing properties. The skilled artisan would have had a reasonable expectation of successfully producing a stable gel styling composition since Muller teaches that the pregelatinized starch datives is used in a high viscosity gel formulation.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and In *re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1, 3-16 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 3-20 of copending Application No. 10/511,120 in view of Keil.

The '120 claims are directed to a mousse, foaming, or hydroalcoholic composition comprising one or more pregelatinized, crosslinked starch derivatives, one or more anionic polymers and one or more nonionic polymers that meet the limitations of the instant claims.

Although the conflicting claims are not identical, they are not patentably distinct from each other. While the copending claims do not require the composition to be in gel-type, Keil, as discussed above, teaches an enabling disclosure to make a hair styling gel composition with the polymers of the '120 claims.

It would have been obvious to a skilled artisan to modify the invention of the '120 claims to a gel-type styling composition, as motivated by Keil, because the latter teaches that styling gel provides good hair fixing properties and distributing properties.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 1, 3-16 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-9, 12-17 of copending Application No. 10/511,122 in view of Keil.

The '122 claims are directed to a hair care composition comprising one or more pregelatinized, crosslinked starch derivatives, one or more polymers selected from cationic, anionic, and nonionic polymers that meet the limitations of the instant claims.

Although the conflicting claims are not identical, they are not patentably distinct from each other. While the copending claims do not require the composition to be in gel-type, Keil teaches an enabling disclosure to make a hair styling gel composition with the polymers of the '122 claims.

It would have been obvious to a skilled artisan to modify the invention of the '122 claims to a gel-type styling composition, as motivated by Keil, because the latter teaches that styling gel provides good hair fixing properties and distributing properties.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Conclusion

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gina C. Yu whose telephone number is 571-272-8605. The examiner can normally be reached on Monday through Friday, from 8:00AM until 5:30 PM..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on 571-272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Gina Yu

Gina C. Yu
Patent Examiner